No. 90-839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF KERN,

Petitioner,

vs.

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE McKENZIE, BOB TEMPLE, BARRY SCHULTZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

In accordance with United States Supreme Court Rules, Rule 22, the County of Kern submits this Brief in reply to the Brief of Respondents. The County will touch on the new points attempted to be made, and will address the basic errors of the arguments of Respondents.

There are two broad areas of Respondents' argument which are errant. The first is an attempt to beguile this Court into an "all or nothing" decision. Respondents argue a reversal of the Ninth Circuit will deprive the

federal government of its power to promote a healthy economy, and eliminate FLSA protection for all public employees entirely.

The errors are obvious. This case involves only workers classified as exempt executives. Public executives do not comprise "10%" of the work force. Petitioners argue the court below made an improper interpretation of the FLSA, and do not seek to entirely negate application of the FLSA to local governments.

The second area involves characterization of the evidence, and dwelling on irrelevant material. In broad terms, the Ninth Circuit overturned the trial verdict based upon the circuit court's determination of whether Respondents met the "Salary Test" of the FLSA (29 C.F.R. §§541.1, *et seq.*). The "Duties Test" was not considered by the circuit court. Comments on the duties of Battalion Chiefs are therefore irrelevant.

Respondents similarly argue local entities have been subject to, and have implemented FLSA as to *executive* employees, wherefore the decision below yields no new burden. As appears from the record in the present matter, and appears abundantly from the several Amicus Briefs submitted, the majority of public employers have paid FLSA overtime only to rank and file employees. Public employers have relied on the exempt status of their executives for purposes of budgeting and fixing pay.

SPECIFIC ERRONEOUS ASSERTIONS

At pages 1 and 2 of their Brief, Respondents contend Kern County wishes to cut off the federal government's right to foster the economy and assure decent minimums of pay and working hours for all public employees. As

above noted, the assertion 10% of the labor force is affected is patently incorrect. This case involves only employees Kern County has classified and treated as *exempt* from FLSA. A reversal therefore would affect only public employees classified as exempt, not the entire public work force. Further, the County argues the exemption of executives under FLSA should be constitutionally applied, not that it should be abolished as to local entities.

The numerical sophistry continues at page 18 of Respondents' Brief. It is there asserted Kern County's liability is "only" about $37,000.00. Respondents admit this amount is only for a one year period, and relates only to the "routine" overtime of three hours per week, based on a $17.08 wage rate.

Suit was filed in this matter in 1986, soon after FLSA again became applicable to local employers. Therefore, the liability of Kern County extends from April 1, 1986 to the present — never mind the future effects. Four and one-half years, at about $37,000 per year indicates a liability of over $166,000, not including interest, attorney's fees or the possibility of liquidated damages.

To the amount admitted by Respondents one must add, for example, overtime for training sessions and call-back overtime for travel to and from the affected Battalion Chief's home. Respondents' implicit assumption concerning the County's liability appears ingenuous.

In attempting to denigrate the County's version of the fiscal impact, Respondents also completely ignore the impact of the ruling below on the balance of Kern County's employees. The County has about 7,000 workers, of which about 1,200 are classified as exempt under FLSA. Since none of the workers meet the "Salary Test" as the

Ninth Circuit applied it, the 28 Battalion Chiefs are only the tip of a very large iceberg indeed.

On a practical fiscal level, one must consider also the levels of compensation envisioned by the FLSA itself. One test of an executive is that he be paid at least $250.00 (29 C.F.R. §§541.1, *et seq.*) per week, or just over $6.00 per hour. Congress clearly did not contemplate bonus pay for persons making two or three times that amount, in enacting the FLSA.

The premium for overtime contained in FLSA (time and one-half) would give Battalion Chiefs an extra $8.54 per hour, or extra compensation more than double the federal minimum wage. This is a far cry from the "decent minimum" Congress sought to enforce in the FLSA.

Perhaps the most egregious positions are those taken as to the union status of Battalion Chiefs. While Battalion Chiefs are in the same union as rank and file employees, they were not "placed" there by Kern County, and their pay terms are different than for rank and file as Respondents implicitly admit, *e.g.*, that Battalion Chiefs are paid straight time for much of their "overtime" (Respondents' Brief, p. 13).

Respondents also claim the County has not availed itself of the compensatory time off ("CTO") option of FLSA. The County produced testimony that the various department heads could use either money or CTO, at their discretion, to compensate overtime. Further, use of CTO exists at every level of County employment excluding positions not covered by civil service, such as elected officials and appointed department heads.

At pages 20 and 21, Respondents contend the County did not make its legislative intent arguments at the district or circuit court levels. This has an aura of appeal,

yet ignores the alignment of the parties below. The County prevailed at trial on the merits, the district court finding Battalion Chiefs were properly classified exempt, as the FLSA has been interpreted and applied by the Department of Labor. No policy or constitutional arguments were needed.

The issues on appeal to the circuit were framed by Respondents. Their attack was primarily on the findings of the trial court, and did not focus on the issues now germane. Constitutional and public policy questions arose only by reason of the Ninth Circuit's aberrant ruling, which is under attack in the present proceeding.

Another misconception appears at pages 27 and 28, where Respondents argue no evidence of a pre-April 15, 1986 statute or ordinance precluding payment for time not worked (or covered by paid leave) was presented by the County. At trial the County's Director of Personnel, Joseph E. Drew, testified that the State Auditor considered pay for time not worked or covered by accrued paid leave was an illegal gift of public funds. Chapter 3.20 of the Kern County Ordinance Code (enacted in the 1960's), as Mr. Drew testified, sets forth the terms and conditions of public employee compensation, and includes express and exclusive provisions controlling pay to civil service employees.

Respondents, like the Ninth Circuit, consistently ignore this local ordinance. Ignoring evidence does not indicate there is no evidence. The evidence was adduced, entered, and argued.

At page 23, Respondents argue that if Congress wanted a different application of the "Salary Test," they would have said so legislatively, and that one may not infer a contrary intent from its failure to act. While this is a general principle of statutory construction, it is clear Congress has simply not considered the problem.

As quoted in the Petition and argued by various Amici, the language used in the 1974 and 1985 legislative debates and processes repeatedly refers to "nonsupervisory" public employees, and speaks of extending a guaranty of a "decent minimum" of wages and hours to local (nonsupervisory) government employees. In fact, the 1974 enactment expressly did not apply to public supervisory employees (HR 93-913, at p. 2837).

Indicative of its intent, Congress from the start left to the Department of Labor ("DOL") the task of defining the exemptions. *See* 29 U.S.C. §213(a)(1). The debates underlying both the 1974 and 1985 amendments to the FLSA uniformly refer to *nonsupervisory* public employees, and concern for the fiscal impacts of FLSA on local governments even as to rank and file employees is consistently expressed.

Contrary to Respondents' argument, while public employers have implemented FLSA for all public employees, they have since 1986 relied upon the application of the "Salary Test" made by the DOL in treating management personnel as exempt. Public executive and managerial employees have generally not been paid time and one-half.

In this regard, one of the earliest questions raised by the DOL, was whether classifications (as exempt executives) made by local civil service systems should be considered in applying the FLSA's exemption for executive employees (50 Federal Register 47696). In considering implementing rules, the DOL did not make a final rule on the "Salary Test's" (29 C.F.R. §§541.1, *et seq.*) application to public executive employees.

The DOL has still not enacted a rule as to how (or whether) the "Salary Test" will be applied to public employment. Rather, the only guidance given to public employers since 1985 came in the form of a Letter

Ruling dated January 9, 1987. The Letter Ruling states changes had been proposed, including elimination of the "Salary Test," and notes new rules regarding the test were under consideration. The Letter then concludes by stating the "Salary Test" will not be applied to deny an exemption to public employers, in civil service systems having a rule in place forbidding payment for time off not covered by paid leave time.

The DOL has not to date enacted new rules, or rescinded this Letter Ruling. Local entities have relied on the Letter Ruling in not paying time and one-half overtime to executive employees, contrary to Respondents' assertions.

In arguing there is no Congressional intent to apply the "Salary Test" to public entities differently than to private industry, Respondents ignore the express fact Congress has left to the DOL implementation and interpretation of this area of the FLSA. Since Congress deferred to the DOL, Respondents should also, and the Ninth Circuit should likewise have shown great deference to the DOL's interpretation and lack of enforcement of the "Salary Test," *Zenith Radio Corp. v. United States* (1978) 437 U.S. 443, 450.

CONCLUSION

Respondents have not addressed the profound constitutional and public policy issues raised by the Petition. They choose rather to continue to press a position which seeks only to enrich persons who are already highly paid, at taxpayer expense, for no public purpose.

Kern County does not seek to avoid a "decent minimum" for rank and file employees. Ironically, and contrary to Respondents' characterization of the County's

position, Kern County applies FLSA to its executive employees, and under the Act has determined which employees are exempt, in reliance on the interpretation of the FLSA expressed by the DOL under Congressional mandate. The Ninth Circuit (accepting Respondents' position) has departed from the proper, constitutional *application* of the FLSA's "Salary Test."

The County therefore seeks first, reasonable limitation of the *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, to preserve the reality of federalist principles contained in our Constitution, and to preserve reasonable civil service practices in the interests of public policy and accountability.

Kern County seeks reversal alternatively, as a way to spur Congress and the DOL on to fully and realistically consider how to implement FLSA in the public sector.

Respectfully submitted,

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